No. 13,559

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ALASKA STEAMSHIP COMPANY and
AMERICAN RADIO ASSOCIATION, CIO,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT AMERICAN RADIO ASSOCIATION, CIO.

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JURISDICTION.

The National Labor Relations Board, herein called the Board, has brought this case before the Court, pursuant to Section 10(e) of the National Labor Relations Act, as amended,[1] herein called the Act, for enforcement of its order issued on February 11, 1952, against

[1] 61 Stat. 136, 29 USC, Supp. V, Sec. 151 et seq. Relevant portions of the Act appear in the Appendix, at the end of this brief. Unless otherwise stated, references in this brief are to sections of the Act.

Alaska Steamship Company, herein called the Company, and American Radio Association, CIO, herein called the Union. This Court has jurisdiction of these proceedings under Section 10(e) of the Act. The Board's decision and order (R. 24-86, 97-105), are reported in 98 NLRB 22.

I. STATEMENT OF FACTS.

A. The Union.

The Union is a labor organization within the meaning of the Act, admitting to membership employees of the Company (R. 28).

B. The Company.

The Company, a Washington corporation, with its principal place of business in Seattle, is primarily engaged in the maritime industry, in the operation of ocean-going vessels for the transportation of persons and cargo between continental ports of the United States and ports in the Territory of Alaska (R. 9-10, 18, 28, 125).

C. The Issues; Subsequent Determinations by the Board; Proceedings in this Court.

Horace W. Underwood, a marine radio officer, first filed charges against the Company and the Union in January, 1950. Amended charges were filed against the Company on March 20, 1950, and against the Union on January 22, 1951 (R. 3, 5, Gen. Counsel Ex. 1).

A consolidated complaint against the Company and the Union, issued by the Board on the latter date,

charged in substance: (1) that on December 3, 1948, the Union and the Company entered into a collective bargaining contract (later amended on July 14, 1950), which provided that the Company would secure its marine radio officers for its vessels from offices of the Union and that the contract contained preferential hiring provisions which violated the permissible limits prescribed in Section 8(a)(3);[2] (2) that effective May 15, 1949, shipping rules, implemented by assignment lists, were administered by the Union, according to which the Union allegedly restricted referrals to positions as radio officers with the Company and other employers, to Union members; and (3) that the Company, by acquiescing in and consenting to such practice of obtaining radio officers from the Union, whereby the Union allegedly refused to dispatch Underwood to employment as a radio officer with the Company or any other employer following December 1, 1949, engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3), and that the Union engaged in unfair labor practices within the meaning of Sections 8(b)(2) and (1)(A) (R. 9-18).

The Union filed answer in which it admitted the jurisdictional allegations and also admitted the execution of the contracts above referred to. It denied that it had engaged in unfair labor practices (R. 21-22). The Company in its answer admitted the jurisdictional

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[2]Actually, the contract and the amended contract were entered into between the Union and an employers' association of which the Company was a member, with the same force and effect as though entered into between the Company and the Union (Gen. Counsel Exs. 3 and 4).

facts relating to its business, but denied that it had engaged in unfair labor practices (R. 18-21).

Following hearings and the taking of testimony, a Trial Examiner for the Board issued his intermediate report and recommended order on July 3, 1951 (R. 24-87), to which both the Company and the Union duly filed exceptions (R. 87-91, 92-97).

On February 11, 1952, the Board issued its Decision and Order (R. 97-105). The Board filed petition for enforcement of its order in this Court on September 30, 1952 (R. 265-267), to which the Company and the Union respectively filed answers on October 15, and December 1, 1952 (R. 270-290).

By stipulation of the parties, none of the exhibits which have been introduced need be printed and this Court may use and consider the original exhibits which are on file in the case (R. 291-292).

D. The Labor Relations Between Respondents.

On December 3, 1948, the Pacific American Shipowners Association, herein called PASA, entered into a collective bargaining agreement (herein called 1948 agreement), with the Union (Gen. Counsel Ex. 3), in behalf of the Company and other employers. In part the contract provided as follows (Gen. Counsel Ex. 3, p. 2):

> "PREFERENCE OF EMPLOYMENT
>
> Section 1. Employers agree to recognize the Association as the authorized collective bargaining agent for all Radio Officers employed by the Em-

ployers and when filling vacancies preference of employment shall be given to members of the Association.

HIRING

Section 2. The names of all unemployed members of the Association shall be placed on the Association's unemployed lists at the various offices of the Association. The offices of the Association shall be the central clearing bureaus through which all arrangements in connection with the employment of Radio Officers shall be made. For the purpose of promoting safety of life and property at sea, and to guarantee as far as is practical equal distribution of work among all members of the Association, the parties hereto agree that vacancies shall be filled in the following manner. Preference shall be given the Radio Officer longest unemployed who can present proof of previous employment and/or experience on a job or jobs similar to that which is offered, and who in the judgment of the Employer is qualified, competent, and satisfactory to fill the job.

When any Radio Officer is rejected, the Employers shall furnish a statement in writing to the Association stating specifically the reason why he is not qualified, competent, or satisfactory to fill the job. * * *"

In 1949 the Pacific Maritime Association, herein called PMA, succeeded PASA as the employer association, and the subsequent contract involved herein was entered into between the PMA and the Union (Gen. Counsel Ex. 4).

In *Pacific Maritime Association,* 89 NLRB 894, the Board previously considered the validity of the hiring provisions of the 1948 agreement. The import of the decision there is unrelated to the issues before this Court. On April 28, 1950, the Board found that the mere execution of the 1948 agreement, which contained unlawful preferential hiring provisions, violated Section 8(a)(1), and ordered PMA (as successor to PASA) to cease giving effect to the 1948 agreement. In compliance, PMA and the Union signed a new agreement on July 14, 1950, herein called the 1950 agreement, and made it effective April 28, 1950 (Gen. Counsel Ex. 4). The 1950 agreement contained no provision giving preference of employment to members of the Union (Gen. Counsel Ex. 4, p. 2).

The General Counsel charged in this case, that the 1950 agreement contained unlawful preferential hiring provisions. Upon the Trial Examiner's recommendation, the Board dismissed such allegations. Likewise, the Trial Examiner recommended dismissal of, and the Board dismissed the complaint to the effect that any discrimination occurred in the administration of the 1950 agreement (R. 41-47).

Inasmuch as the validity of the hiring provisions contained in the 1948 agreement (Gen. Counsel Ex. 3) had already been litigated in Case No. 20-CA-166 (89 NLRB 894) and since the 1950 agreement superseded the 1948 agreement, that issue was not relitigated in this case (R. 39-40). Therefore, the only issues here involved relate to the alleged discrimination against Horace W. Underwood.

E. Facts Relating to Horace W. Underwood.[3]

The Company has utilized the employment offices of the Union, or its predecessors, to secure sea-going radio officer personnel since 1935. The Company maintains no facilities for hiring such personnel directly. The practice in the industry to secure other categories of sea-going employees, has likewise been through the employment offices of the collective bargaining agent representing employees in a particular classification involved (R. 256-257).

Underwood was continuously employed as radio officer by the Company on the COASTAL RAMBLER commencing April 2, 1949, and terminating on or about August 6, 1949 (R. 110-113, 140-142). It was a permanent job (R. 142-143, 154, 166, 170, Union Ex. 5). At that time, as a member of the Union (R. 110, Union Ex. 6), Underwood was dispatched to the vessel by the Union (R. 142). On or about August 6, 1949, the COASTAL RAMBLER laid up, became inactive, and the entire crew paid off, including Underwood (R. 141). At that time, under rules uniformly applied in the operation of the Union's rotary hiring system, Underwood had a recognized union right to "stand by" his job on the COASTAL RAMBLER and to sail with the vessel when she next resumed active operation (R. 142-143, 167-168). However, Underwood decided to draw unemployment compensation. Under applicable rules and regulations of the State Unemployment Compensation Department, Underwood could not "stand

[3]This section includes also some of the material in Company's brief from middle of page 6 to page 14 thereof.

by'' his job and draw unemployment compensation, because, to be eligible he was required to be actively seeking employment (R. 137, 142-143, 150, 164-165, 168). Since Underwood had decided to draw unemployment compensation, he had to relinquish his right to ''stand by'' the job on the COASTAL RAMBLER (R. 143, 167). He was then placed on the ''active'' list at the employment offices of the Union on August 10, 1949, for subsequent dispatch in normal course under the rotary hiring system (R. 144, 166-169, Union Ex. 5).

On or about September 14, 1949, Underwood took a ''relief'' job through the Union's rotary hiring system, on the PALISANA (R. 113-114, 145-146, 159-160, 233, Union Ex. 5). It ''laid up'' on November 22, 1949 (R. 114, 146), and the crew, including Underwood, paid off (R. 145, Union Ex. 5). The effect was to put Underwood back on the Union's ''active'' list, in a position lower than what it was on September 14, 1949, when he took the PALISANA job. This was so because under the principles of rotary hiring in the Union, Underwood, as an ''employed'' radio officer, dropped 30 places per week on the Union's assignment list during his period of employment. That was true whether a radio officer was then employed on a relief or permanent job (R. 114-155, 118, 139-140, 192-193).

At the time his relief job terminated on the PALISANA on October 21, 1949, Underwood claimed that under the *old* shipping rules of the Union no longer in effect, he would have been entitled to keep the job on the PALISANA as a *permanent* one

when the vessel next sailed (R. 113). The evidence clearly shows, however, that under the shipping rules then applicable, Underwood's "relief" job terminated and in the normal course of dispatch, the position on the PALISANA was properly offered to the men next on the assignment list (R. 114-115, 176-177).

Underwood was then placed on the Union's "active" list, under the rotary hiring system, on December 1, 1949 (R. 131, Union Ex. 5). During the period just discussed, Underwood was a member of the Union (R. 110, Union Ex. 6) and had been dispatched to vessels operated by the Company through the employment offices of the Union (R. 142, Union Ex. 5).

The evidence thus far reviewed is highly significant. It pointedly demonstrates the basis for certain unwarranted antipathies by Underwood against both the Union and the Company. It is the starting point of his subsequent conduct. An understanding of this background is pertinent in appraising the conduct of the Union and the Company in this case.

For some years past, and at the pertinent times material to this case, Underwood had wanted to work *only* in a *permanent* job, and *only* on *vessels operated by the Company.* He consistently refused job opportunities with other companies (R. 115-118, 138-139, 147-149, 155-157, 172-173). As a result, Underwood believed that the rotary hiring system operated unfairly as to him. He rationalized that a "permanent" job only with the Company would be to his advantage because all other radio officers, competing with him,

were seeking *all job opportunities with all companies* under the rotary hiring system (R. 149, 153). Underwood described this condition as "discrimination" against him. Obviously it has nothing to do with "discrimination" as defined in the Act, since no element of union or non-union affiliation enters the picture at all. Underwood described the rotary system of job dispatches as a "roulette wheel" (R. 163-164).

Because he believed that the rotary hiring system operated unfairly against him, Underwood "got mad" at the Union and by letter resigned his membership on December 28, 1949 (R. 113, 115, Union Ex. 6). His testimony and the letter of resignation establish his reason for resigning to be *his personal opposition to the rotary hiring system,* and not because of any union or non-union aspects thereof. He quit the Union solely because of his belief that the system operated unfairly as to him in his desire to achieve a permanent job with the Company (R. 114-115, 149, Union Ex. 6).

The Union interpreted Underwood's letter of resignation to mean that he no longer wanted to ship through, or to utilize, the employment offices of the Union (R. 181, 254), and after January 7, 1950, his name was removed from the Union's national assignment list (R. 230, 251).

Just *before his resignation from the Union, Underwood* attempted to secure employment in *preference* to those on the Union's rotary hiring list, by applying directly to the Company for a position as marine radio officer (R. 126-129, Gen. Counsel Ex. 8). Likewise,

after his resignation from the Union, he expressed an interest, in correspondence with the Company between March 3, 1950 and May 25, 1950, to obtain employment directly from the Company without reference to the rotary hiring system (R. 160-161). Underwood expressed his opposition to the rotational hiring system of assignment of radio officers. Underwood maintained his preference for a system of hiring based upon seniority *with one company.* In his judgment this would have afforded him a better chance of employment by the Company (R. 160).

In response to some of Underwood's letters and to his application for employment theretofore filed with the Company, it wrote and advised him to register for employment at the shipping industry's employment office (for radio officers) on the Union's premises, whose services the Company used to man its vessels with radio officers. The Union was also notified of this course of correpondence (Gen. Counsel Exs. 9 and 10).

Upon receipt of the Company's letter (Gen. Counsel Ex. 10), Underwood went to the employment offices of the Union, requested to be dispatched, and he subsequently advised the Company of his action in this respect (R. 146-147, 174).

On April 12, 1950, the Company wrote to the Union enclosing a letter of April 3, 1950, which it had received from Underwood. According to the Company's interpretation, Underwood expressed the opinion that the Union would discriminate against him. On April 19th the Union reassured the Company that as always

Underwood would be dealt with indiscriminately (R. 178). Subsequent to this exchange of correspondence Underwood did not advise the Company of any alleged instances of discrimination against him in the use of the normal channel of employment—the hiring offices of the Union—*and the evidence establishes that in fact there were no instances of any discrimination against Underwood.* Underwood himself did not deny that the shipping rules were at all times applied as equally to him as to members of the Union.

The undisputed testimony of Lundquist, Seattle Port Agent for the Union, establishes that between December 1, 1949, and July 1, 1950, radio officers, both union and non-union, were dispatched indiscriminately to employment if they filed written job applications (R. 220, 255). Under the "old" shipping rules opportunities in the industry were made equally available to union and non-union members at the Union's employment office between December 1, 1949, and July 1, 1950 (R. 255). After the "new" shipping rules were adopted in June 1950, following the Board's order in *Pacific Maritime Association,* 89 NLRB 894, the same indiscriminate treatment was again afforded to union and non-union men alike. *Between June 1950 and February 1951 (just before the hearing was held in this case) the Union's shipping lists show that following an indiscriminate method of job referrals as to union and non-union men alike, the Union had dispatched 51 non-union men to jobs (Union Ex. 26).*

After December 1949, Underwood persistently refused to register for work at the Union's employment office (R. 254-255). This is how Port Agent Lundquist put the matter:

> "A. * * * The answer to that question is what I have already stated, that Mr. Underwood has never come in to me or to anyone else in the office while I have been here or at any time prior that I know of and registered to go on the assignment list. The list is made up and assignments are made in accordance with a set of rules which is national in scope, and which is definitely just as applicable to the Seattle branch as anywhere else. I have no right to deviate from those rules, and neither has any other port official who may place Mr. Underwood's name or anyone else's name on that national list, unless such applicant for employment as a radio officer specifically fills out—and all he has to fill out is his signature because I fill in the rest of the data indicating his name, the port where he wants to ship from, and the date he goes on the list." (R. 219-220.)

In the hope of avoiding trouble, and despite Underwood's refusal to register, Lundquist nevertheless accorded him *preferential treatment* to which he was not entitled under the employment office shipping rules adopted in June 1950. Lundquist testified in this regard as follows:

> "Now, because * * * I have no desire to persecute Mr. Underwood or anybody else * * * I felt that I was bound in my own conscience to hold him available for assignment in some manner, even though

> I could not list him on a master assignment list (i.e., because of Underwood's refusal to register), and I had to figure out to my own satisfaction and in my own mind according to the facts I had, what I could ascertain from Miller and Underwood, as to his length of employment, his possible registration date, and how that would affect him on the list.
>
> Mr. Underwood would not agree with that, and he would never fill out an assignment slip which would permit his name going on the master list." (R. 220.)

At all times subsequent to April 3, 1950, Underwood received equal treatment in the normal channel of employment, the employment offices of the Union. He was offered at least three jobs by Miller, then Port Agent for the Union (R. 116-117, 132-133, 138-139), all of which Underwood refused. During the summer of 1950, Miller attempted to contact Underwood and found that he was employed in an Alaska cannery since July 23, 1950 (R. 134, 254). Following Underwood's return from Alaska on October 9th, he contacted Lundquist, who had replaced Miller as Port Agent for the Union in September 1950. He told Lundquist that he was available for employment, but *only in certain limited categories of jobs*—i.e., *permanent* assignments to vessels of the Company only, engaged in *short runs* (R. 194). Underwood was offered a number of jobs between October 9, 1950 and February 27, 1951, all of which he refused because they did not meet his requirements (R. 155-157, 239-242). On the latter date, and

at *the very moment* that Underwood lifted the prior restrictions as to his desire for work only with the Company, he was dispatched to, and he accepted, a permanent job on the PACIFICUS, a vessel operated in the Alaska trade by the Coastwide Line (R. 171, 241).

Underwood himself testified that at this time, according to his own best judgment, based upon his position on the "active" Union assignment list when he terminated on the PALISANA in November 1949, that *"without the Korean war I would not have been employed on the Alaska (Steamship Company) ships until the spring of 1951"* (R. 114-115, 175-176). This was confirmed by Lundquist who said it was due to a general slump in shipping and because of unemployment conditions in the industry (R. 186-187, 228-229). Even so, Underwood would not have received assignment to Alaska vessels of the Company between December 1949 and November 8, 1950, *notwithstanding* the intervening Korean war. That is clearly established by the chronological history of jobs filled on vessels of the Company during that period (Union Ex. 27, R. 230-239). Even if Underwood had remained a member of the Union during that entire period, he would not, under the normal operation of the Union's rotary hiring system, have been referred to any permanent job on vessels of the Company between December 1949, and November 8, 1950.

II. SUMMARY OF FACTS AS TO UNDERWOOD.

A. The Gist of Underwood's Self-Created Difficulties.

The following colloquy between the Trial Examiner and the Board's General Counsel, in a nutshell, points up the problem in the case:

> "Trial Examiner Hunt. Was it Underwood's testimony that he wanted a job in that run (the Alaska Steamship Co.) with any company other than the respondent company,
>
> Mr. Teu. He wanted an Alaska Steamship Company ship.
>
> Trial Examiner Hunt. Is that your recollection of his testimony, Mr. Teu?
>
> Mr. Teu. *I don't think* there is any testimony to the effect that *he would have taken* an assignment on *any other lines shipping in the Alaska trade.* I don't recall any to that effect." (R. 253.) (Emphasis supplied.)

This discussion came at the end of the case, when the Board's attorney was in a position to appraise all of the testimony.

The gist of Underwood's welled-up, subjective, "persecution complex" leading him to believe that the Company and the Union sought to deprive him of the opportunity to follow his calling, is best portrayed by the following all-party stipulation. Between April 1, 1949 (nine months before his resignation from the Union) and July 3, 1950 (approximately when the Union's "new" shipping rules took effect), Underwood, in writing, took the following positions (R. 157-159):

1. He opposed the rotational system of indiscriminately assigning radio officers to jobs in the industry.

2. He wanted employment *only* with the Employer —thus self-limiting his employment opportunities to only one out of some thirty-odd shipping companies, covered by the contract between the Union and PMA.

3. He refused to compete with other radio officers for jobs with the Employer.

4. Since 1946, Underwood has always stated to the officials of the Union that he wanted work *only* with the Company.

5. He was aware that by holding a relief job (i.e., his job on the PALISANA to which he was assigned on September 14, 1949) would require that he, in accord with the usual practice, would drop 30 places on the assignment list for each week of employment.

6. He opposed the spread-the-work limit of 90 days "stand by" and maintained, that although found desirable by the Union and its members, he thought it was not a good rule for employees of the Company.

7. He knew, upon taking it, that the PALISANA was a relief job, and that in doing so, he "sacrificed all my (his) chances on the list and gambled on whether the relief job on the PALISANA may eventually become permanent * * *" (R. 159-160.)

8. By reason of the length of his employment on the S/S COASTAL RAMBLER in 1949, Underwood actually dropped to the bottom of the list by the rule of dropping 30 places weekly for each week of employment.

It was further stipulated (R. 160-161), that between early March and the end of May 1950, Underwood claimed in a series of eleven letters to the Company that:

1. His only interest was to get a job with the Company to the exclusion of all other Companies.

2. He was opposed to the Union's rotational system.

3. That hiring into the Company, *based only on seniority with it alone,* would have afforded Underwood a better chance for a job.

The overall picture of the matter just reviewed, shows that what Underwood was seeking for himself were disparate privileges and advantageous treatment, not accorded other radio officers in the industry whether they were union or non-union members. In fact, had either the Union or the Company been willing to abide by Underwood's misconceptions as to what he was entitled to under the law, discrimination in reverse would in fact have been practiced, i.e., radio officers in the industry would have been discriminated against by the preferential treatment which Underwood was demanding.

Underwood's warped ideas (really misconceptions), of the respective rights and obligations of the parties to this litigation, which began an unbroken chain of his personal disappointments, is sharply focused by his belief that the PALISANA job was a *permanent* assignment, when in fact the official assignment slips of the Union (Union Ex. 5) shows the contrary. Whether the job was permanent or temporary, whether he

was a union or non-union man, his work upon the PALISANA would have, in his own words, "dropped (him) so far down that without the Korean war, I (he) would not have been employed on the Alaska ships until this Spring of 1951." (R. 114-115.)

Underwood admitted that when he terminated the PALISANA job, he went back to the rotational hiring list to his "relative position" as of that date (R. 156). His conception as to relative rights of radio operators as compared to those of employees in other departments on the Company's vessels, particularly "the Master and the mates and the rest of the licensed officers" with respect to seniority rights which the latter enjoy and, as he thought, the radio officers do not possess, is again revealing as to Underwood's unjustified sense of outrage. He desired work only with the Company because "they have almost a monopoly on that run"; he wanted work only in the Alaskan trade and would not accept any other job off-shore except under "duress". Therefore, he made no application for, nor would he seek any other job (R. 148-153). Underwood himself said:

> "Q. So that you mean, as I understand your testimony, that you only want to work for the Alaska Steamship Company?
>
> A. Of course, since they have almost a monopoly on that run.
>
> Q. You want to work in the Alaska trade?
>
> A. That is right. I want to work in the Alaska trade.
>
> Q. Only?
>
> A. Only.

Q. You would not accept a job on any other steamship run offshore?

A. Not except under duress." (R. 148.)

On cross examination, he admitted that the Union's shipping rules were equally applied to him, as they were to others in the Union's Seattle branch. The following colloquy between Underwood and the Trial Examiner pointed up his difficulty:

"Q. Was your effort to secure both a permanent and temporary job with the Alaska Company, or just a permanent job?

A. I wanted to get a permanent job because a temporary job puts you down on the list, and you would never have a permanent job as long as there is a beach list." (R. 173.)

Even as to *permanent* assignments, Underwood limited his availability to short runs only, i.e., of approximately three weeks duration (R. 194). The Board so stipulated (R. 253). On December 13, 1950, Underwood for the first time changed his availability from *permanent* to *temporary* assignments. However, he still limited his availability for employment only by the Company (R. 107-108). As to his conversation with Lundquist on that day, Underwood admitted that the former said "I can't discriminate against you" nor "against any other members" (R. 136).

As to the need for registration at the union hall for an assignment to a job, Underwood admitted the long established practice, confirmed in detail by Port Agent Lundquist. It was as follows: one copy of the assign-

ment slip (Union Ex. 5) is usually retained by the registrant for work and "one copy goes to the main office (of the Union) in New York." That is the only means by which his name could be placed upon the Union's national job assignment list. (R. 131-132.)

In March 1949, Underwood agreed, in writing, to abide by the Union's normal and reasonable rules (Union Ex. 4), which the proviso of Section 8(b)(1)(A) of the Act, as amended, protects. As to dispatching him as an unemployed radio officer to a job, Underwood admitted the obvious, i.e., that if he, as a non-union man does not come in to the union hall to apply for, and to register in writing for a job, and make known his availability—the Union would not know of his unemployment (R. 162). He further admitted that an assignment slip must be signed each time a man's category changes (R. 170). Despite this necessary practice, he refused to register with the Union and to sign a registration slip between December 1, 1949 and February 27, 1951. On the latter date, *for the first time* since he had resigned from the Union, Underwood indicated to the Union that he would take a job other than a permanent one with the Company. In fact, he admitted that he "did not go near the Union (after he resigned in December 1949) until the Alaska Steam wrote me (in March 1950) and told me to go there (to the union hall) and register." (R. 173.)

The Board has found that the shipping rules, by means of which the assignments are made to vacant jobs, are lawful, and their application to union and non-union radio officers are non-discriminatory (R. 39-

47, 98-105). The Union, by every means, has operated its employment office within the law. Since the Union operates an employment office, non-union men necessarily must be required to take their turn along with union members in job referrals, for obviously, the Act does not require preferential treatment by an employment office so as to *prefer* non-union over union registrants.

Of the shipping rules enacted in June 1950 (Union Ex. 1), Nos. 5(a), (b), 6(a), (b) and (c) are immediately relevant. They provide:

5(a) —that radio officers must register as "active", meaning available for work, in a specific branch office of the Union.

5(b) —a place on the national shipping lists depends on the time when such application is "actually" received in the port branch of the Union.

6(a) —an applicant must fill out in full, an assignment slip.

6(b) —each branch is required to forward the assignment slips to the national office of the Union.

6(c) —the National Secretary is required to retain all application slips.

Moreover, as recognized by the Board (R. 41), the Federal regulations covering the maritime industry impose additional and very serious obligations upon an employment office dispatcher before he refers a man for a job aboard American flag vessels. Consequently, a maritime employment office dispatcher, before he can send a radio officer to fill a vacancy, must, by law,

check for the following three qualifications, before he can refer a man to obtain a marine radio job in the trade in which the Company is engaged (R. 222-227):

1. A license by the Federal Communications Commission.

2. Since the summer of 1948, a license by the U. S. Coast Guard as a condition to the right to be designated as a radio officer by Congressional Act (Public Law 525, 80th Congress, Second Session).

3. Since October 1950, the U. S. Coast Guard must "screen" all seamen (including, of course, radio officers) as to their loyalty and security risk status (Executive Order 10173, October 18, 1950; Fed. Reg. 7005, interprets or applies 40 Stat. 220, as amended, 50 USC, 191).

In order that a dispatcher in the employment office operated by the Union may properly carry out the contractual obligation of the Union to dispatch men *"qualified, competent and satisfactory"*, as provided in Section 2 (3rd paragraph) of the July 14, 1950 agreement (Gen. Counsel's Ex. 4), and "maintain, administer and operate its employment office * * * in accordance with the law * * *" (4th paragraph), *registration in writing is necessary, in order to check for the 3 qualifications above set forth, before an applicant, be he a union member or not, can be dispatched.* It has been shown that Underwood consistently refused to file his written application, thus preventing the Union from abiding by its contractual as well as the Government regulations above reviewed.

The Union has further demonstrated that after November 8, 1950, while Underwood was then ahead of others on the lists with relation to his numerical standing when he resigned, he could not have been assigned to a job with the Company because he himself imposed limitations of "temporary" and "short run" assignments on the Company vessels excluding jobs in trades other than the "Alaska" trade.

Underwood's absence from the national list was explained on the basis of his refusal to register at the Union's employment office. Notwithstanding the failure of Underwood to register at the hall, Port Agent Lundquist knew the specific standing of Underwood on the Seattle port list, even though no number was assigned to Underwood on that list. Lundquist frankly conceded that he might have been violating the Union's own rules by placing Underwood's name on the list, since the latter had not registered. Underwood was thereby afforded shipping privileges and his status on the list, as of October 9, 1950, was thereafter preserved intact. It was on the latter date that Underwood "first notified me (Lundquist) he was available, even though he had not complied with the requirements and registered" (Original Reporter's Transcript of Record, 550-551). Lundquist also stated that he waived the need for registration by non-union members including Underwood, and he placed them on the Seattle port list. Their failure to register by filling out an application form, is the reason why they could not be on the national lists, for the registration slips usually made out

in triplicate with one copy going to union headquarters, were not available by reason of such refusal to register (Original Reporter's Transcript of Record, 552).

Port Agent Miller, Lundquist's predecessor, concluded from Underwood's resignation as a member of the Union that he did not want to ship through the Union employment office. When Lundquist took over as Port Agent, in September 1950, he had the same understanding. The Union first became aware of Underwood's contrary intent when he wrote to the Company that he apparently did want to utilize the Union's employment office (however, minus the requirement of filing a written job application or registering). The Union then contacted Underwood to refer him to a job. The offer was unavailing, for Underwood's daughter informed Miller that the former was working in Alaska (R. 181, 254). The reason Underwood's name could not appear on the national lists, was the result of Underwood's refusal to register at all (R. 195, 200-201). When the cannery job in Kake, Alaska, ended on October 9, 1950, Underwood was required to, but refused, to register for employment. This was the same procedure required of all others who were in an unemployed status, whether they were union or non-union men (R. 221, 247). The record is clear that if Underwood had re-registered sometime after June 1950, when the new Union shipping rules became effective, his name would have appeared on the National job assignment lists (R. 252).

Another explanation by Lundquist as to the reason why the non-union radio officers assigned between June 29, 1950 and February 17, 1951 (Union Ex. 25) were not on the National lists, was that during the Korean war there was a shortage of available radio officers, both union and non-union men. Therefore, those who did register in the branch offices were given jobs within the same week of registration, and therefore, by the system followed in reporting to the National office each week, a registrant who is assigned to a job in the same week of his registration for work, whether he be a union member or not, is not reported to the National office (Original Reporter's Transcript of Record, 552, 555-559).

As to the inclusion of Underwood on the Seattle branch lists: When Lundquist learned from Underwood that he was back from his cannery job in Alaska and was available for a permanent job only with the Company, Lundquist placed his name on the list (Union Ex. 7). He was thereafter carried week by week on the lists and would have been assigned if the type of job he wanted was available. When, in December 1950, Underwood first indicated to Lundquist that he was available for a *temporary* job in addition to his previous request for only a permanent job with the Company, that change in status was recorded on the port list (Union Ex. 8). In evidence, as Union Exs. 9 to 19, inclusive, are the weekly Seattle port lists from the first week in January 1951, to the week immediately prior to the hearing held in this case. There too, Underwood's status for availability for assignment to

the type of job which Underwood wanted, was recorded. On the six occasions evidenced by Union Exs. 20-25, when jobs were available to which Underwood might have been assigned, Lundquist explained the circumstances which prevented such assignments. His testimony is uncontradicted and was credited by the Board (R. 204-216). When Underwood indicated his availability for the type of job which he had previously refused to take and when he was actually on hand to accept the job, he was immediately dispatched (R. 203). This, despite the fact that Underwood had not previously registered as required by the "new" shipping rules and the practice in the Seattle port.

B. Underwood Would Rather Collect Unemployment Insurance Than Work.

Underwood's desire to collect unemployment insurance instead of working was the basis of his difficulty when he refused to stand by the COASTAL RAMBLER, operated by the Company (R. 164-165). Apparently easy money without the need to work was a matter of greater interest to Underwood than the acceptance of a proffered job. The Union referred him to a job on a vessel going to Honolulu, sometime after he had resigned as a member, but since he was then collecting unemployment insurance benefits, it would mean that he would have to forego such further benefits by accepting the job. He chose to refuse the job and to remain idle at the same time collecting unemployment insurance (R. 139).

His difficulty with the lay-up of the COASTAL RAMBLER was of a similar nature. At R. 164-165, Underwood testified that he thought that the COASTAL RAMBLER would "lay up" for thirty days. In the same breath he indicated that it would take at least thirty days to obtain his unemployment insurance benefits. Yet he chose to collect the latter, rather than to stand by in the protection of the permanent job which he had aboard the COASTAL RAMBLER. Having elected to do so, he necessarily had to abandon his permanent job rights aboard the COASTAL RAMBLER,—proof again that his interest is primarily in the collection of unemployment insurance, rather than to "stand by" in the protection of a permanent job.

It is appropriate to observe that Underwood created his own difficulties. He misjudged the period of the lay-up of the COASTAL RAMBLER. He thought it would lay up for a longer period than is covered by the unemployment insurance payment period, but he guessed wrong. As already shown in this brief, this incident was the trigger point for all of Underwood's pent-up emotions and difficulties with himself, rather than with the Company or the Union (R. 163).

C. The Board's Conjectures as to the Relative Numerical Standing of Deyo and Underwood as of January 7, 1950.

The Trial Examiner engaged in mental gymnastics in straining a construction to lead to a conclusion that Underwood had a lower number than Deyo as of January 7, 1950. Based upon this misconception the Trial

Examiner found that a failure to refer Underwood to the S/S ALASKA on May 5, 1950 was discrimination. There were only two of the weekly assignment lists offered in evidence (Union Exs. 28 and 29). One was dated December 31, 1949 (Union Ex. 28), and the other was dated March 10, 1951 (Union Ex. 29). They were merely introduced as sample lists, for they all are quite bulky. (Each list contains about 20 pages.) It would have been unnecessarily burdensome to submit all of the assignment lists from December 1949 to March 1951. The December 31, 1949 list was selected because it was illustrative of the method of listing for job vacancies for members of the Union, while Underwood was still a member. The March 10, 1951 assignment list was presented to illustrate the method of listing all radio officers, union and non-union men alike, on the very latest list, contemporaneous with the holding of the hearings before the Board in March 1951. There is no justification for the Trial Examiner's conclusion that the number of Deyo was other than 793 on the January 7, 1950 list, as compared with 796 as Underwood's position on the same list. Lundquist very frankly indicated that because he had prepared Union's Ex. 27, which showed the chronology of assignments of radio officers to Alaska Steamship Company vessels between December 1, 1949 and the middle of February 1951 (the latter date being just shortly before the hearings commenced), a long time before the commencement of the hearings, he did not recall the significance of the line drawn through the figure 793 opposite Deyo's name on Union's Ex. 27,

and the meaning of the figure 815 appearing above the crossed-out figure of 793. Lundquist's testimony was credited by the Board in *all other* material respects. Lundquist testified that the relative standing of Deyo was 793 and that of Underwood was 796 on January 7, 1950. There is therefore no foundation for the conjecture, surmise and guess which the Trial Examiner necessarily had to make to determine that Deyo's number was 815 and not 793 at the time Underwood's number was 796. Lundquist testified without contradiction that based upon Underwood's standing on the January 7, 1950 list Underwood could not have been assigned to any job up to November 8, 1950 (R. 230-231), which was beyond the period of May 5, 1950, when the Trial Examiner found that Deyo's assignment should have been Underwood's.

Furthermore, the Trial Examiner's conjecture that Deyo was sent ahead of Underwood and out of numerical order is based on an assumption that Underwood had an *absolute* right to such an assignment. This flies in the face of the uncontradicted testimony and the finding of the Trial Examiner, affirmed by the Board, that Underwood had restricted fully and completely the kind and type of job which he would even consider. Under the *Universal Camera* and *Pittsburgh SS. Co.* decisions, 340 U.S. 474 and 498, such conjecture flies in the face of the Supreme Court's direction to the National Labor Relations Board that a finding should only be made based upon *substantial* evidence on the record considered as a whole. There is not only a lack

of *substantial* evidence, but in fact there is no evidence at all to sustain the Board's affirmance of the Trial Examiner's surmise, guess and conjecture in this regard.

D. Back Pay, If Any, Must Be Confined to the Period Between May 5 and October 5, 1950.

Notwithstanding the fact that Underwood was a non-Union member, he was nevertheless offered jobs even after he resigned as a member of the Union (R. 59, 131-133, 220).

In all of the circumstances, the Board's order may not be enforced. Therefore, no back pay would be involved. However, if the Court should find discrimination at all, it can only find it to have existed between May 5th and October 9th, 1950. The Trial Examiner at R. 59, (affirmed by the Board), reviewed Underwood's employment history between these two dates. He found that on July 23, 1950, Underwood by his own voluntary act, removed himself from the maritime labor market in the port of Seattle, for any possible assignment to a radio officer's job. He did so by accepting employment as a radio operator in a cannery at Kake, Alaska, on July 23, 1950. He did not return until October 9, 1950. Furthermore, it has already been shown that Underwood during that time and thereafter, limited his availability to *permanent* jobs only, on vessels operated by the Company *only*, and of "short run" duration—conditions which could not be met by the employment office dispatcher, until Underwood removed such restrictions on February

27, 1951. Back pay, if any is to be assessed, must therefore be confined to the period between May 5, 1950 and October 9, 1950.

III. ARGUMENT.

BY REASON OF ERRORS OF LAW, LACK OF SUPPORT BY ANY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE, FAILURE OF SUPPORT OF ANY OF THE BOARD'S FINDINGS, THE BOARD'S ORDER SHOULD NOT BE ENFORCED.

The Union agrees with so much of the Company's brief which begins at page 15 and continues through page 36, with the exceptions hereafter noted. In the main, the analysis as to the "Conclusions of the Board", the nature of the "Order of the Board", and the "Specifications of Errors Relied Upon" at pages 15-18 of its brief, is likewise adopted by the Union, except as stated hereafter. So also with the "Argument" and the "Conclusion" at pages 18-36 of the brief submitted by the Company, with the exceptions hereafter noted.

The Union does not agree with item 5 of the Company's "Specifications of Errors" on page 17. On the contrary, the entire course of correspondence among the Company, Underwood and the Union as shown by the Record, makes it abundantly clear that the Company knew that Underwood had resigned his membership because of his twisted notion that the employment office maintained since 1935 at the union hall, operated, among other things, as a "roulette wheel".

The Union further disagrees with the contention of the Company on page 18, that the Board erred in re-

fusing to find that the Union alone should be responsible for any alleged discrimination and that the Union alone is to provide the "Remedy" set out in the Board's order.[4]

As to the portion of the Company's brief under the section of "Argument", pages 19, et seq. The Union excepts to the Company's statement in the third paragraph that the removal of Underwood's name from the Union's lists in January 1950 was without the knowledge of the Company, for which the Company may not be held in the event that this Court should sustain the Board's order.

The reference to Underwood's resignation from the Union in December 1950 (Company's brief top of page 21) should be December 1949.

On page 23 of the Company's brief, last paragraph, the Union is in general agreement with its content, except insofar as there is an implication that there was any need for the Company to ask Underwood to register at the employment office or that there was any need for the Company to request the Union to dispatch Underwood "without discrimination". There had been no discrimination in fact, nor any intent to discriminate against Underwood or anyone else. Therefore, there was no need for the Company to ask Underwood to register with the Union, nor was there any need for

[4]In discussing the potential joint liability of the Company and the Union in any order which the Court may make in this case the Union is not to be deemed to waive its position that the Board's order is wrong, and that it should not be enforced at all.

the Company to ask the Union not to "discriminate" against Underwood.

As to the last paragraph on page 24, and over to page 25, of the Company's brief—the Union is in general agreement with the views there expressed. However, the Union does emphasize that the "preferential" hiring clause condemned by the Board in a prior case (89 NLRB 894), was subsequently deleted in July 1950. The evidence is clear and implicit that in June 1950 new and indiscriminate rules for job dispatch of employed radio officers were effectuated by the Union to implement the requirements of the subsequently negotiated July 14, 1950 agreement between the PMA and the Union to dispatch unemployed radio officers "according to law" (Gen. Counsel Ex. 4, fourth paragraph).

As to page 25, and continuing for two-thirds of the page on page 26—the Union agrees. It does not agree with the general tenor of some of the implications which tend to imply any "fault" on the part of the Union.

As to the material beginning at the bottom of page 26 and through page 29 of the Company's brief, the Union is in complete disagreement with the Company. The Union does however agree with the second and third paragraphs on page 29, i.e., that the Union interpreted Underwood's letter of resignation (Union Ex. 6) to mean that he no longer desired to utilize the Union's employment offices or to ship by means of the facilities there provided. Moreover, the Union's

interpretation of Underwood's resignation in December 1949 was a most normal reaction to be expected of the Union and its officials. That Underwood himself understood his resignation to mean that he wanted no more of the Union's employment office is buttressed by his own action in applying directly to the Company for employment *even before his resignation from the Union became effective* (R. 126-129, Gen. Counsel Ex. 8).

As to all of page 30 to the middle of page 33, the Union completely disagrees. The Company asserts that a back pay order should be assessed only against the Union. Its position is wrong for the following reasons: The Record is replete with evidence that the Company knew of Underwood's claim for alleged "discrimination". As has been shown, the Union on its part did all it could, at all times, to refer Underwood to any available job. It was his refusal to register at the employment office managed by the Union which precluded the latter from assigning Underwood to a job. Underwood testified of his continued and varied correspondence with the Company putting it on notice that he claimed to have been discriminated against (R. 162). In fact, there was an undertone of a cooperative enterprise between Underwood and the Company to place the Union in an embarrassing position when the Company knew that the Union could not assign Underwood to a job with the Company in view of the operation of the employment office under the same system which has existed since 1935 (R. 163).

The law is contrary to that for which the Company contends. This Honorable Court, in *NLRB v. Pinkerton National Detective Agency,* 202 F. (2d) 230 (C.A. 9th, 1953), held both the Union and the Employer to respond to a back pay order, when discrimination was found on the part of both. An earlier case in the United States Court of Appeals for the 7th Circuit, *Union Starch & Refining Co. v. NLRB,* 186 F. (2d) 1008, is to the same effect. Congress rejected the type of remedy which the Company in this case contends for. The House Bill, H.R. 3020, 80th Cong., 1st Sess., in 1 Leg. His. 68,195, carried a provision which would have restricted a Board order to compel a choice as to the assessment of a back pay order between an Employer and a Labor Organization. It was rejected by the Conference Report (H. Conf. Rep. 510, 80th Cong., 1st Sess., 54). The principle of a *joint* assessment of a remedial back pay order, was also recognized in *NLRB v. Acme Mattress Co., Inc.,* 192 F. (2d) 524 at 528 (C.A. 7th, 1951). See also, *NLRB v. Newspaper and Mail Deliverers Union, etc.,* 192 F. (2d) 654 at 656 (C.A. 2nd, 1951).

Indeed, under all of the circumstances of this case, if back pay should be ordered as part of the Remedy in the case, the Union ought not to be included in such an order. In the *Rockaway News Supply Company* case, 94 NLRB No. 156 (1951) a Trial Examiner's recommendation that a Union be made jointly and severally liable with an Employer for any loss of pay suffered by non-union employees by reason

of discriminatory treatment accorded them, was held not to be justified, since the allegations and evidence in that case against the Union were limited to violations arising under a 1948 contract. The Board refused to hold the Union for acts of discrimination arising solely out of two earlier contracts, i.e., those of 1946 and 1947. So also in the instant case, the alleged discrimination occurred under the prior 1948 contract. It was amended in July 1950, and the Board, in the instant case found it to be a valid agreement. It also found that the application of the shipping rules under the 1950 agreement were also valid. It has been demonstrated that Underwood refused to comply with the registration provisions in the use of the Union employment office for job dispatch (R. 171, 181, 195, 200, 201, 221, 247, 252, 254; Trial Examiner's Intermediate Report, R. 56, sustained by the Board). This, and not any act of the Union was the cause of Underwood's problems, if any.

Back pay may be required of a labor organization jointly along with an employer, only where the Union is responsible for unlawful discrimination against employees. *United Electrical Workers, etc., Independent (Gardner Electric Co.),* 95 NLRB No. 47 (1951).

As to the Company's brief beginning one-third down on page 34 to the portion marked "Conclusion" on page 35, the Union is in full agreement. It is well, however, to emphasize the following as an additional reason in demonstrating that the Board is wrong in its assumption that Underwood would have elected to

"stand by" the ALASKA when the vessel laid up for the winter on October 14, 1950. It is well to observe that the root of Underwood's self-created dilemma, i.e., his refusal to stand by the COASTAL RAMBLER in August 1949, was at a time when, by his own admission, he had expected it to be tied up *for only thirty days.* He maintained then that his economic condition did not warrant a "stand by" for that length of time. Therefore, in considering the "back pay" order, it is wholly unwarranted for the Board to assume that even if Underwood had been in the vessel's employment when the S/S ALASKA tied up on October 14, 1950, *for the entire winter season,* not to resume until the following spring, that he would have waited as a stand by to the same vessel until the spring of 1951, for in 1949, he would not even stand by the COASTAL RAMBLER for thirty days only.

CONCLUSION.

The petition for enforcement should be denied. The Board's order in its entirety should be set aside. In the alternative, if the Board's order is in any respect to be enforced, it should be modified to require back pay jointly by the Company and the Union for the period of May 5, 1950 to October 14, 1950 only. In the realistic overall picture presented by this case, the Court should further modify the Board's order so as to eliminate the need for the posting of any

notices whatever, if any portion of the Board's order is enforceable.

Dated, San Francisco, California,
September 21, 1953.

Respectfully submitted,
JAY A. DARWIN,
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CIO.

(Appendix Follows.)

Appendix.

Appendix

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: Provided, That nothing in this Act or in any other statute of the

United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice), to require as a condition of employment, membership therein on or after the thirtieth day following the beginning of such employment, or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) *if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.*[1]

* * * * * * *

Provided Further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * *

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[1]The italicized portion has been eliminated by amendment since these proceedings were instituted.

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7;
* * * * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise;
* * * * * * *

Sec. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice,

and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * * * *

Sec. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decee enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evi-

dence on the record considered as a whole shall be conclusive. * * *

* * * * * * *

Sec. 18.[2] * * *

* * * * * * *

Sec. 18. (b) Subsection (a) (3) of section 8 of said act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with section 3 (f), (g), and (h) and (ii) unless following an election held as provided in section 9 (e) within 1 year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

[2]Section 18 was created by Public Law 189, 82d Cong., 1st sess., enacted October 22, 1951.